

Dated: March 5, 1998

PECFA UPDATE #13

Annual Laboratory Bids and Other Commodity Bids

The program has encountered recurring problems in processing claims in which commodity purchases do not comply with bidding requirements in §ILHR 47.33(1)(b). About 60 currently pending appeals involve this issue. In most cases, the problems relate to inadequate documentation of the bid process or inadequate attention to the requirements in the rules for obtaining and accepting bids.

The department's position continues to be that it will not develop bid specifications or approve bid specifications or contracts for individual consultants. What your firm requires in its specifications reflects professional engineering judgment and is solely the responsibility of the consulting firm and individual consultant.

The following reminders may be helpful in assuring compliance with PECFA requirements, however. These reminders summarize the claim decisions being made by the department on bidding issues and also the position the department is taking in appeals involving bidding issues.

1. You are required to obtain 3 valid bids for each and every commodity purchase.

If you initially obtain 3 bids and later disqualify a bidder for some reason, there are no longer 3 valid bids. You must either solicit a third bid if it is possible to do so competitively, or you may have to re-bid entirely. One way this problem can be avoided is by establishing minimum qualifications for bidders and pre-qualifying them before you seek their bids instead of waiting until after bids are received.

Some of the reasons given by consultants for disqualifying a bidder include site specific characteristics that make it impossible for one or more bidders to enter the site (for example, clearance under bridges, signs, or utility wires) and performance problems with one or more of the bidders (for example, one of the bidders does not perform work over a holiday week-end, the bidder has been slow on past work, or the bidder does not meet quality control requirements.) These may be valid qualification criteria, however after these criteria are applied there must be three remaining bids from qualified providers.

<i>If a claim does not contain bids from 3 <u>qualified</u> providers for each commodity service, payments made by the claimant to the selected commodity provider are ineligible for reimbursement.</i>
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2. PECFA will not reimburse the low bidder's price for a service if a higher bidder or non-bidder is selected to perform the work.

Section ILHR 47.33(1)(b), Wis. Adm. Code, states that a "minimum of 3 bids are required to be obtained and the lowest cost service provider shall be selected." The rule requires you to select the provider who gives you the lowest bid. It does not allow you to select someone else and seek reimbursement for the price the lowest cost provider would have charged. In other words, a consultant or owner is not permitted to select a higher cost provider and pay the difference. Owner choice (with the owner paying the difference) is permitted only with regard to remedial alternatives, not commodity purchases.

The department will continue to deny the **entire** cost submitted from any provider who is not the low bidder. Some reasons we have seen for selecting a higher bidder or non-bidder include "project continuity", "staff took samples to wrong lab," "staff made a math error," "more costly to bid than to use our regular contractors", and "the provider was already on a neighboring site." None of these reasons are acceptable.

<i>You must select and use the lowest cost service provider. The claimant may not use a higher bidder and be reimbursed for the amount of the low bid.</i>
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3. For annual laboratory bids, you are required to obtain bids based on estimated volume of testing for the year.

Section ILHR 47.33(1)(b)2., Wis. Adm. Code, states that "consulting firms may elect to bid laboratory services on a calendar-year basis in order to obtain volume discounts and reduce the number of bids that shall be completed for each remediation." If you do not tell the prospective bidders what the volume is, either for individual analytes or based on the number of PECFA sites your firm works on each year, you have not met the requirement to use the annual bid process "in order to obtain volume discounts."

Grant reviewers frequently see so-called requests for bid that simply ask for a laboratory's price list. This does not comply with the requirement in the rule that you may elect to bid laboratory services on a calendar-year basis "in order to obtain volume discounts." If one or more laboratory annual bids is titled "price list" the department will look closely at what you sent to the laboratory to obtain the bids. If you did not define the analytes to be bid and the estimated volume, the bids obtained will not meet the requirement to competitively bid to obtain volume discounts.

A list of analytes arranged in a sample bid format is attached to this update. The sample format is based on similar formats used by many consulting firms to request laboratory bids. It is not mandatory that you use this format, however using a substantially similar format will assure that all information in annual laboratory bids is complete, that every analyte you use or may use on any PECFA site during the year is actually bid by 3 competing labs, and that labs have information about the estimated number of each test they are bidding on. So long as you obtain bids on every listed analyte from all 3 laboratories, and your estimated volume for each can be justified by your past experience, this format will be acceptable to the PECFA program. **In addition, if all analytes in the sample format are competitively bid, PECFA will reimburse for any other PECFA-eligible analytical tests purchased from the same lab, even if not listed.**

If your request for annual bids from laboratories does not provide information about volume or other documentation that you were bidding on an annual basis in order to obtain volume discounts, the laboratory services on all claims under that annual bid may be ineligible for reimbursement.

4. You must obtain 3 bids for any PECFA-eligible laboratory tests not included in the annual bid.

If you obtain annual bids for only a portion of the PECFA-eligible analytical tests, you will have to document compliance with the bid requirement for other PECFA-eligible tests actually used on an individual site. For example, we have seen bids which only cover soil testing, not PECFA-eligible tests of groundwater. Where the consultant then uses the same lab for ground water testing without bidding, we will disqualify the costs of every test which was not bid by 3 or more labs. A sample listing of PECFA eligible analytes was provided to you in Update #12 issued February 1997, and an updated listing is contained in the sample bid format attached to this update. To assure every analyte on the list is bid by 3 competing laboratories, you must require that all labs bid every analyte, even if they have to subcontract some of the tests they do not perform in-house. You may require information about the subcontracting and may develop specifications for such subcontracting, but if you disqualify the arrangements described by any of your bidders, you must assure you still have a total of 3 completely comparable eligible bids remaining. If any analyte is left blank by one or more of 3 labs, you will not have 3 competing bids for that analyte.

If you test for PECFA-eligible analytes that are not included in either an annual or a site-specific bid, the cost of that testing will be ineligible for reimbursement.

5. You must select the laboratory which is the lowest cost provider for PECFA-eligible testing.

Your firm may do non-PECFA work that routinely involves sampling and testing for analytes that are not PECFA eligible, or you may sometimes be required by DNR to perform non-PECFA eligible testing (such as PCBs) on a PECFA-eligible site. Be very cautious in trying to bid eligible and non-eligible lab work. It is advisable not to include ineligible work in the same bid document you will submit to PECFA to assure you do not mistakenly consider the ineligible analytes in choosing the bidder. You may not use a laboratory which is the lowest cost provider for the combination of PECFA and non-PECFA lab work if another provider is the lowest cost provider for

just the PECFA-eligible work alone. The program will not subsidize lower costs on ineligible work. The issue of not including ineligible items in PECFA bids was addressed in Update #2 issued October 20, 1993.

If laboratory bids contain both eligible and ineligible tests, the PECFA grant reviewer will delete all ineligible tests from all the bids and redetermine the low bidder based only on eligible tests. All work performed by a lab that is not the low bidder on PECFA eligible analytes is ineligible for reimbursement.

6. If you obtain annual lab bids, you must use the lowest cost laboratory, even if on an individual site you are only performing tests that could be obtained at lower cost from another bidder.

The program permits consultants to bid laboratory services on an annual basis because obtaining volume discounts reduces costs across all PECFA sites. We recognize that the specific tests used on a single specific site may occasionally be cheaper from one of the higher bidders. If you elect to use annual bidding for laboratories, you must accept the lowest bid and use the lowest bidder for all your PECFA-eligible laboratory services. (See ILHR 47.33(1)(b)2.) If you have an annual bid in place but choose to bid an individual site on a site-specific basis, we will be reviewing whether there were valid reasons the annual laboratory bid could not be used and also whether 3 site-specific lab bids were obtained.

If you do annual bidding for laboratory services, you must select the low bidder and use that bidder to perform lab work during the year.

7. You may not use an otherwise low cost provider for commodity services not included in the provider's bid.

We have seen numerous instances where the bid specifications for drillers ask only for bids to do soil borings. Then when the consultant needs monitoring wells, he uses the driller already on site, without soliciting bids for that service.

You are expected to anticipate the services that will be required on a site when you do requests for bids. If unanticipated services are needed, you are required to obtain 3 competitive bids for the additional services. Section ILHR 47.33(1)(b)1., requires that all commodity services be bid. Change orders may not be used to add unbid services to a contract with a commodity bidder. Under §ILHR 47.33(4), Wis. Adm. Code, change orders may be used for consulting services only; there are no provisions for using change orders to modify the scope of commodity service bids or contracts. Some firms develop standard forms for commodity providers to use in submitting prices and include in the form all services used on PECFA sites, even if it is not certain all those services will be used on a given site – this protects against many contingencies.

As a side note, in the above example, if you obtain the new bids for installation of the monitoring wells, and a different provider is low bidder, the department may disqualify any additional mobilization costs for the second driller if the cost could have been avoided by good planning. The need (or potential need) for groundwater monitoring, flush mounts and bumpers in high traffic areas, and locating wells in areas that will not be affected by upgrades or building construction on the site are all factors which should normally be foreseeable by the engineer or consultant responsible for coordinating work on the site. There is no reason you cannot obtain unit costs from each driller for all types of mounts, all drill sizes, and all types of drilling equipment you may use on the site. Anticipating contingencies in the bid specifications assures you will have unit costs for all equipment, materials, and services that might be needed.

The department will disqualify any payments made to commodity service providers for services that were not bid, even if the provider is a qualified low bidder for other services.

8 PECFA will not reimburse for costs exceeding the bid submitted by the commodity provider.

PECFA will not reimburse for more than the unit costs that were bid, even if the provider bills at a higher rate and the claimant pays the higher cost. For example, if the lab quotes a price of \$28 for a given lab test, PECFA will not reimburse \$30. If an excavator quotes \$4/ton for backfill, PECFA will not reimburse \$6.

PECFA will not reimburse for more than the amount of a lump sum bid. If a contractor quotes a lump sum bid of \$3,000 for a service, PECFA will not reimburse \$4,000, even if performing the service required unexpected work. A low bidder on a lump sum project cannot perform work outside the scope of the project at a "time and materials" rate unless all bidders included a dollar amount for such a rate in their bids and the bid specifications indicated how "time and materials" rates would be compared in the overall choice of the winning bid.

Where contingencies exist, the consultant and the bidder are expected to consider them in the bid process. The risk of unanticipated costs can be handled by the consultant and the provider in a number of ways, including re-bidding on a unit cost basis. How you choose to approach lump sum bidding is a professional judgment which is the consultant's responsibility.

Where either unit costs or lump sum costs exceed the bid, the grant reviewer will authorize the bid amount and deny the portions of the invoice that exceed the bid.

9 PECFA will not reimburse for commodity services if three bids for each service are not included in the claim.

In the past, claimants have been asked to submit only the bid specifications for the winning bidder and a form 2B showing the amount of all bids, including the higher bids. Because the program has encountered so many instances where bids were not comparable or the lowest bidder was not selected, you are now required to submit all the bids and to summarize all bids on the form 2B for all new claims. This will save time for all of us by reducing additional information requests.

The grant reviewer is required to determine whether the costs claimed meet the requirements to bid all commodity services and to select the lowest cost provider. If documentation is not in the claim to verify compliance with these requirements, the cost of the commodity services will be denied. Because of the volume of claims, the grant reviewer will not generally contact you to request documentation.

Generally, you need to send only the bid responses from the 3 bidders for each commodity service if the specifications are clear from the bid responses. If selection criteria are not apparent from the bid responses, you should submit other documentation, such as directions to bidders or written specifications used to assess the bids.

This PECFA Update is distributed to registered consulting firms. The consulting firm is responsible for distributing copies to all staff involved in the bidding process and in the PECFA claim preparation process and also for assuring that the commodity purchase rules are followed.